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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 WILLIAM T. MACE,

12 Petitioner,

13 v.

14 W.L. MONTGOMERY, Warden,

15 Respondent.  
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Case No.: 16cv1802-JAH (KSC)

**REPORT AND  
RECOMMENDATION RE  
RESPONDENT'S MOTION TO  
DISMISS FIRST AMENDED  
PETITION FOR WRIT OF HABEAS  
CORPUS**

[Doc. No. 11]

18  
19 Before the Court is a First Amended Petition for Writ of Habeas Corpus ("Amended  
20 Petition") filed on August 10, 2016, by petitioner William T. Mace ("petitioner"), a state  
21 prisoner proceeding *pro se* and *in forma pauperis*. [Doc. No. 5.] On November 17, 2016,  
22 respondent W.L. Montgomery ("respondent") filed a Motion to Dismiss the First Amended  
23 Petition for Writ of Habeas Corpus as untimely filed. [Doc. No. 11.] On March 10, 2017,  
24 petitioner filed an Opposition to the Motion to Dismiss. [Doc. No. 15.] After a thorough  
25 review of the Amended Petition [Doc. No. 5], respondent's Motion to Dismiss [Doc. No.  
26 11], petitioner's Opposition thereto [Doc. No. 16], and the supporting documents submitted  
27 by the parties [12], the Court **RECOMMENDS** that respondent's Motion to Dismiss be  
28 **GRANTED** and that the Amended Petition be **DISMISSED**.

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## I. PROCEDURAL HISTORY

The record of petitioner's prior state and federal judicial proceedings presented in the Amended Petition spans approximately six years, beginning with his 2011 criminal conviction and sentencing, until the August 2016 filing of the Amended Petition, which is now before the Court. In July 2011, petitioner was convicted of one count of murder and two counts of attempted murder in San Diego Superior Court.<sup>1</sup> [Doc. No. 12-1.] On March 27, 2014, the California Court of Appeal affirmed the judgment on all counts in that case<sup>2</sup>.

On May 6, 2014, petitioner filed a petition for review to exhaust state remedies in the California Supreme Court. [Doc. No. 12-2.] On June 11, 2014, the California Supreme Court summarily denied the petition in that case<sup>3</sup>. [Doc. No. 12-3.] On October 20, 2014, petitioner filed an application with the Court of Appeal, Fourth Appellate District, requesting an order directing petitioner's appellate trial counsel to furnish petitioner's appellate trial files to petitioner.<sup>4</sup> [Doc. No. 12-4.] On October 23, 2014, the Court of Appeal, Fourth Appellate District, denied this request without prejudice. [Doc. No. 12-6.] The Order notified petitioner that he could file an appropriate motion in the superior court. *Id.*

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<sup>1</sup> At trial, petitioner admitted that while he was a passenger in a vehicle traveling on the freeway, he fired several shots at another vehicle, including the shot that killed the murder victim, but claimed that he did so in self-defense because he believed that an occupant of the other vehicle was reaching for something with which to attack him. [Doc. No. 12-12, at p. 1.]

<sup>2</sup> Case Number D061642

<sup>3</sup> Case Number S218377

<sup>4</sup> On October 23, 2014, the deputy clerk with the Court of Appeal, Fourth Appellate District, notified petitioner in a letter that his application, filed on October 20, 2014, was erroneously filed as a petition for writ of mandate and assigned the wrong case number. [Doc. No. 12-5.] The deputy clerk further notified petitioner in the October 23, 2014 letter that petitioner's application should have been filed in case number D061642, *The People v. Mace. Id.* The deputy clerk corrected the error and the application requesting an order directing petitioner's appellate trial counsel to furnish petitioner's appellate trial files to petitioner was correctly filed in case number D061642. *Id.*

1 On December 15, 2014, petitioner filed a second application with the Court of  
2 Appeal, Fourth Appellate District, requesting an order directing petitioner's appellate trial  
3 counsel to furnish petitioner's appellate trial files to petitioner. [Doc. No. 12-7.] On  
4 December 15, 2014, the Court deemed the application a petition for writ of mandate, and  
5 assigned it case number D067129. [Doc. No. 12-8.] On December 17, 2014, the Court  
6 denied petitioner's application directing petitioner's appellate trial counsel to furnish  
7 petitioner's appellate trial files to petitioner. *Id.*

8 On September 23, 2015, petitioner filed a petition for writ of habeas corpus in the  
9 Superior Court of San Diego, case number HSC11516, alleging he received ineffective  
10 assistance of counsel from both his trial and appellate counsel, and that insufficient  
11 evidence supported his conviction. [Doc. No. 12-9.] On October 1, 2015, the Superior  
12 Court of San Diego denied the petition on the merits. [Doc. No. 12-10.]

13 On December 7, 2015, petitioner filed a petition for writ of habeas corpus in the  
14 California Court of Appeal, Fourth Appellate District, at case number D069352, alleging  
15 ineffective assistance counsel from his trial and appellate counsel, and insufficient  
16 evidence to support his conviction. [Doc. No. 12-11.] On December 9, 2015, the Court of  
17 Appeal, Fourth Appellate District, denied the petition on its merits. [Doc. No. 12-12.]

18 On January 19, 2016, petitioner filed a petition for writ of habeas corpus in the  
19 California Supreme Court, case number S231901, again alleging ineffective assistance of  
20 counsel from his trial and appellate counsel, and insufficient evidence. [Doc. No. 12-13.]  
21 On April 27, 2016, the California Supreme Court denied the petition for writ of habeas  
22 corpus. [Doc. No. 12-14.]

23 On July 11, 2016, petitioner filed a petition for writ of habeas corpus in this Court  
24 (hereinafter "First Federal Petition"). [Doc. No. 1.] On July 18, 2016, this Court denied  
25 the First Federal Petition without prejudice for failing to pay the filing fee and failing to  
26 name a respondent. [Doc. No. 2.]

27 The instant Amended Petition was filed on August 10, 2016. [Doc. No. 5.] The  
28 Amended Petition presents four grounds for relief: (1) ineffective assistance of trial

1 counsel; (2) ineffective assistance of appellate counsel; (3) insufficient evidence to support  
2 his convictions; and (4) trial court's denial of the defense request to grant immunity to a  
3 defense witness deprived petitioner of his rights to due process, among other things. [Doc.  
4 No. 5, at pp. 6-10.]

## 5 **II. STANDARD OF REVIEW**

6 The Amended Petition is governed by 28 U.S.C. § 2254, as amended by the 1996  
7 Antiterrorism and Effective Death Penalty Act ("AEDPA"). Section 2254(a) sets forth the  
8 scope of review for federal habeas corpus claims:

9 The Supreme Court, a Justice thereof, a circuit judge, or a district court  
10 shall entertain an application for a writ of habeas corpus in behalf of a  
11 person in custody pursuant to the judgment of a State court only on the  
12 ground that he is in custody in violation of the Constitution or laws or  
treatises of the United States. 28 U.S.C. § 2254(a).

13 As amended, 28 U.S.C. § 2254 (d)(1-2) reads:

14 (d) An application for a writ of habeas corpus on behalf of a person in  
15 custody pursuant to the judgment of a State court shall not be granted  
16 with respect to any claim that was adjudicated on the merits in State court  
17 proceedings unless the adjudication of the claim –

- 18 1. resulted in a decision that was contrary to, or involved an  
19 unreasonable application of, clearly established Federal law, as  
20 determined by the Supreme Court of the United States; or
- 21 2. resulted in a decision that was based on an unreasonable  
22 determination of the facts in light of the evidence presented in the  
State court proceeding.

23 28 U.S.C. § 2254(a) and (d).

24 To obtain federal habeas relief, a petitioner must satisfy either § 2254(d)(1) or  
25 § 2254(d)(2). *See Williams v. Taylor*, 529 U.S. 362, 399, 403 (2000). Under § 2254(d)(1),  
26 "a state court decision is 'contrary to our clearly established [federal precedent] if the state  
27 court applies a rule that contradicts the governing law set forth in our cases' or 'if the state  
28 court confronts a set of facts that are materially indistinguishable from a decision of this

1 Court and nevertheless arrives at a result different from our precedent.’” *Lockyer v.*  
2 *Andrade*, 538 U.S. 63, 73 (2003). Under § 2254(d)(2), “a federal habeas court may grant  
3 the writ if the state court identifies the correct governing legal principle from this Court’s  
4 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at  
5 75. The Supreme Court has clarified that even an erroneous or incorrect state court  
6 application of clearly established law constitutes an insufficient basis to grant a habeas  
7 petition, unless petitioner establishes that the state court’s application was “objectively  
8 unreasonable.” *Id.*

9 When there is no reasoned decision from the state’s highest court, the Court “looks  
10 through” to the underlying appellate court decision. *Ylst v. Nunnemaker*, 501 U.S. 797,  
11 801-06 (1991). If the dispositive state court order does not provide any reasoning to  
12 support its decision, federal habeas courts must conduct an independent review of the  
13 record to determine whether the state court’s decision is contrary to, or an unreasonable  
14 application of, clearly established United States Supreme Court law. *Allen v. Ornoski*, 435  
15 F.3d 946, 955 (9th Cir. 2006). A state court need not cite Supreme Court precedent when  
16 resolving a habeas corpus claim. *Early v. Packer*, 537 U.S. 3, 8 (2002). Absent citations  
17 to Supreme Court precedent, habeas relief is not merited if the state court decision neither  
18 contradicts the reasoning nor the results of Supreme Court holdings. *Id.*

### 19 **III. DISCUSSION**

#### 20 **A. Timeliness of the Petition**

21 Any habeas petition filed in federal court after April 24, 1996 is reviewed under the  
22 provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *See*  
23 *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under the AEDPA, a state prisoner has one  
24 year from the finality of a state court judgment to file a writ of habeas corpus in federal  
25 court. 28 U.S.C. § 2244(d); *Lawrence v. Florida*, 549 U.S. 327, 329 (2007). Once the  
26 AEDPA limitations period expires, a subsequently filed petition for post-conviction relief  
27 from the judgment cannot restart the timeliness clock. *See Jiminez v. Rice*, 276 F.3d 478,  
28 482 (9th Cir. 2001); *see also Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003)

1 (holding that “§ 2244(d) does not permit reinitiation of the limitations period that has ended  
2 before the state petition was filed”); *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002)  
3 (prisoners’ “ability to challenge the lawfulness of their incarceration is permanently  
4 foreclosed” after the one-year limitations period expires).

5 Normally, a “judgment bec[omes] final by the conclusion of direct review or the  
6 expiration of the time for seeking such review,” at which point the AEDPA clock starts  
7 running. 28 U.S.C. § 2244(d)(1)(A); *see Wixom v. Washington*, 264 F.3d 894, 897-98 (9th  
8 Cir. 2001). For purposes of 28 U.S.C. § 2254, “judgment” refers “to the judgment of  
9 conviction and sentence,” and “direct review” is the “direct appellate review of that  
10 judgment.” *Redd v. McGrath*, 342 F.3d 1077, 1081 (9th Cir. 2003); *see Burton v. Stewart*,  
11 549 U.S. 147, 156-57 (2007) (specifying that “final judgment” includes both the conviction  
12 and sentence under which the prisoner is in custody). For 28 U.S.C. § 2244(d)(1)(A)  
13 calculation purposes, the direct review period includes the 90-day period within which a  
14 petitioner may file a petition for writ of certiorari in the United States Supreme Court.  
15 *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999); *Hemmerle v. Schiro*, 495 F.3d  
16 1069, 1073-74 (9th Cir. 2007).

17 The AEDPA limitations period is subject to statutory tolling. The “time during  
18 which a properly filed application for State post-conviction or other collateral review with  
19 respect to the pertinent judgment or claim is pending shall not be counted toward any period  
20 of limitation under this subsection.” 28 U.S.C. § 2254(d)(2); *see Carey v. Saffold*, 536 U.S.  
21 214, 219-20 (2002) (holding that the time during which a state application is “pending”  
22 includes the period between a lower court’s denial of relief and the filing in a higher court,  
23 provided that the filing in the higher court is timely under state law). Under California’s  
24 system of independent collateral review, “a prisoner seeks review of a lower court’s denial  
25 of relief by filing an original petition for habeas corpus relief in the reviewing court.” *Banjo*  
26 *v. Ayers*, 614 F.3d 964, 968 (9th Cir. 2010). “Post-conviction review is ‘pending,’ and thus  
27 the statute of limitations tolls, while a prisoner is pursuing a full round of habeas relief in  
28 the state court,” including the time between a lower court’s adverse ruling and the



1 prisoner's filing for relief in a higher state court. *Id.* (citing *Carey*, 536 U.S. at 219-21).  
2 "The period between a California lower court's denial of review and the filing of an original  
3 petition in a higher court is tolled—because it is part of a single round of habeas relief—  
4 so long as the filing is timely under California law." *Banjo*, 614 F.3d at 968 (citing *Evans*  
5 *v. Chavis*, 546 U.S. 189, 192-93 (2006) (finding a petition timely filed in California if it is  
6 filed within undefined "reasonable time")); *see Waldrip v. Hall*, 548 F.3d 729, 734 (9th  
7 Cir. 2008).

8 When a state court rejects a prisoner's application for post-conviction relief for  
9 failure to comply with state-law conditions of filing, the application is not considered  
10 "properly filed" as required for statutory tolling. *Zepeda v. Walker*, 581 F.3d 1013, 1018  
11 (9th Cir. 2009) (citing 28 U.S.C.A. § 2244(d)(2)); *Thorson v. Palmer*, 479 F.3d 643, 645  
12 (9th Cir. 2007) (untimely petition under state law does not toll the statute because such a  
13 petition is "neither 'properly filed' nor 'pending'"). "[T]ime limits, no matter their form,  
14 are 'filing' conditions," and when the state court rejected a petition "as untimely, it was not  
15 'properly filed,' and [the petitioner was] not entitled to statutory tolling under  
16 § 2244(d)(2)." *Pace v. DiGuglielmo*, 544 U.S. 408, 414, 417 (2005) ("When a post-  
17 conviction petition is untimely under state law, 'that [is] the end of the matter' for purposes  
18 of § 2244(d)(2).") (quoting *Carey*, 536 U.S. at 226).

19 The AEDPA statute of limitations can be equitably tolled, however, in appropriate  
20 circumstances. *Holland v. Florida*, 560 U.S. 631, 645-646 (2010) (as "a nonjurisdictional  
21 federal statute of limitations" [AEDPA] is "subject to a 'rebuttable presumption' in favor  
22 of 'equitable tolling'"); *see also, Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003); *Doe v.*  
23 *Busby*, 661 F.3d 1001, 1011 (9th Cir. 2011). Nevertheless, "a 'petitioner' is 'entitled to  
24 equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and  
25 (2) that some extraordinary circumstances stood in his way' and prevented timely filing."  
26 *Holland*, 560 U.S. at 649 (quoting *Pace*, 544 U.S. at 418). The obstructing casual  
27 circumstances must be "'beyond a prisoner's control' and 'make it impossible to file a  
28 petition on time.'" *Ford v. Gonzalez*, 683 F.3d 1230, 1237 (9th Cir. 2012) (quoting *Spitsyn*

1 v. *Moore*, 345 F.3d 796, 799 (9<sup>th</sup> Cir. 2003) (emphasis in original). The petitioner “bears  
2 the burden of showing that this extraordinary exclusion should apply to him.” *Miranda v.*  
3 *Castro*, 292 F. 3d 1063, 1065 (9th Cir. 2002) (court rejected petitioner’s argument that  
4 “even though his petition was filed after the 1-year statute of limitations had passed, the  
5 district court nonetheless should have applied equitable tolling to find the filing was  
6 timely”).

7 A federal habeas court should “begin [its AEDPA statute of limitations analysis]  
8 with the relevant timeliness calculations.” *Miranda*, 292 F.3d at 1065; *Jorss v. Gomez*, 311  
9 F.3d 1189, 1192 (9th Cir. 2002) (“a court must first determine whether a petition was  
10 untimely under the statute itself before it considers whether [statutory or] equitable tolling  
11 should be applied”).

### 12 **1. Statutory Tolling**

13 In the Motion to Dismiss, respondent contends that the Amended Petition is time-  
14 barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d). [Doc. No. 11-  
15 1, at p. 8.] Respondent contends that the timeliness calculations should commence on  
16 September 9, 2014, based on the following explanation:

17 Petitioner has submitted nothing indicating government action created  
18 an impediment to his filing a federal petition before July 7, 2016, or that  
19 his Petition is based on a newly recognized federal constitutional right.  
20 Moreover, the factual predicates of his claim are based on events  
21 occurring at trial and during his direct appeal. Thus, the statute of  
22 limitations began to run for [petitioner] on the date his judgment became  
23 final. The California Supreme Court denied [petitioner’s] petition for  
24 review to exhaust state remedies on June 11, 2014, and he did not file a  
25 petition for writ of certiorari. Therefore, his judgment became final  
26 ninety days later, on September 9, 2014.

27 [Doc. No. 11-1, p. 9.]; see *Bowen*, 188 F.3d at 1159.

28 Based on the factual record, petitioner did not file an application for post-conviction  
or other collateral review of the pertinent judgment until September 23, 2015, when he  
filed his habeas petition in Superior Court at case number HSC11516, more than one year



1 after the date his direct appeal became final on September 9, 2014. [Doc. No. 12-9.]  
2 Although petitioner filed two applications with the state court of appeal requesting an order  
3 for trial counsel to deliver his trial files on October 20, 2014, and December 15, 2014, these  
4 filings were not applications for collateral review and did not serve to toll the statute of  
5 limitations. [Doc. Nos. 12-4, 12-7]; *Ramirez v. Yates*, 571 F.3d 993, 999-1000 (9th Cir.  
6 2009) (applications for discovery motions do not statutorily toll the limitations period  
7 because prisoners could substantially extend the time for filing habeas petitions); *see also*  
8 *Hodge v. Greiner*, 269 F. 3d 104, 107 (2d Cir. 2001) (applications under state law to obtain  
9 additional documents concerning the investigation of petitioner's offense do not challenge  
10 the conviction, and therefore do not statutorily toll the limitations period).

11 By the time petitioner filed his first state collateral petition on September 23, 2015,  
12 the statute of limitations had already expired. *Ferguson*, 321 F.3d at 823 (holding that  
13 "§ 2244(d) does not permit reinitiation of the limitations period that has ended before the  
14 state petition was filed"). Accordingly, petitioner's First Federal Petition, filed on July 11,  
15 2016, nearly a year after the first state collateral petition, was also untimely.

## 16 **2. Equitable Tolling**

17 The one-year limitations period under AEDPA is also subject to equitable tolling in  
18 certain rare circumstances. *Holland*, 560 U.S. at 645. The petitioner bears the burden of  
19 proving that equitable tolling is appropriate by establishing: "(1) that he has been pursuing  
20 his rights diligently, and (2) that some extraordinary circumstances stood in his way" of  
21 timely filing his petition. *Pace*, 544 U.S. at 418; *see Espinoza-Matthews v. California*, 432  
22 F.3d 1021, 1026 (9th Cir. 2005). More specifically, the petitioner must show that "the  
23 extraordinary circumstances were the cause of his untimeliness and that the extraordinary  
24 circumstances made it impossible to file a petition on time." *Ramirez*, 571 F.3d at 997. The  
25 determinations of whether a petitioner is entitled to equitable tolling is a "fact-specific  
26 inquiry." *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) (citing *Whalem/Hunt v.*  
27 *Early*, 233 F.3d 1146, 1148 (9th Cir. 2000)). Equitable tolling "is unavailable in most  
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1 cases,” as the “threshold necessary to trigger equitable tolling is very high.” *Miles v.*  
2 *Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999); *Miranda*, 292 F.3d at 1066.

3 Petitioner has not claimed that he is entitled to equitable tolling, nor has he submitted  
4 anything that would support such a claim. As evidenced by the record, petitioner has failed  
5 to establish that he was diligent in pursuing his rights. On June 11, 2014, the California  
6 Supreme Court denied petitioner’s petition for review in case number S218377, but  
7 petitioner waited over four months, until October 20, 2014, to file an application with the  
8 Court of Appeal, Fourth Appellate District, requesting an order directing petitioner’s  
9 appellate trial counsel to furnish petitioner’s appellate trial files to him. [Doc. Nos. 12-4,  
10 12-7.] When the state court denied his second application for an order directing petitioner’s  
11 appellate trial counsel to furnish petitioner’s appellate trial files to petitioner, petitioner  
12 waited nine months, until September 23, 2015, before filing a state habeas petition. [Doc.  
13 No. 9.] Thus, petitioner has not been diligent in pursuing his rights. Similarly, petitioner  
14 has failed to establish that there were any extraordinary circumstance(s) that prevented him  
15 from filing a timely petition. Accordingly, petitioner is not entitled to equitable tolling.

16 **a. Actual Innocence Exception**

17 A credible claim of actual innocence supported by newly discovered evidence also  
18 constitutes an equitable exception to the one-year limitations period under AEDPA. *Lee v.*  
19 *Lampert*, 653 F.3d 929, 932 (9th Cir. 2011). In addition to proving that equitable tolling  
20 is appropriate under AEDPA, a petitioner who presents newly discovered evidence of his  
21 actual innocence must demonstrate that, “in light of the new evidence, no juror, acting  
22 reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Schlup v.*  
23 *Delo*, 513 U.S. 298, 329 (1995); *Lee*, 653 F.3d at 938. “Tenable actual innocence . . . pleas  
24 are rare.” *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013). In *Schlup*, the Court noted  
25 that a claim of innocence is “not itself a constitutional claim, but instead a gateway through  
26 which a habeas petitioner must pass to have his otherwise barred constitutional claim  
27 considered on the merits.” *Schlup*, 513 U.S. at 315 (quoting *Herrera v. Collins*, 504 U.S.  
28 390, 404 (1993)); *see also House v. Ball*, 547 U.S. 518, 539 (2006) (noting that the case at

1 hand involved a “federal habeas petition seeking consideration of defaulted claims based  
2 on a showing of actual innocence”).

3 In *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997), the Ninth Circuit held that  
4 “a habeas petitioner asserting a freestanding innocence claim must go beyond  
5 demonstrating doubt about his guilt, and must affirmatively prove that he is probably  
6 innocent.” Demonstrating probable innocence requires “a stronger showing than  
7 insufficiency of the evidence to convict.” *Id.* In *Bousley v. United States*, 523 U.S. 614  
8 (1998), the Supreme Court explained that, “[t]o establish actual innocence, a petitioner  
9 must demonstrate that, in light of all the evidence, it is more likely than not that no  
10 reasonable juror would have convicted him.” 523 U.S. at 623 (internal citations omitted).  
11 In meeting this burden, the petitioner is not limited to the existing trial record because the  
12 issue is “factual innocence, not mere legal insufficiency.” *Id.*

13 Here, petitioner admitted at trial “that while he was a passenger in a vehicle traveling  
14 on a freeway, he fired several shots at another vehicle, including the shot that killed the  
15 murder victim, but claimed that he did so in self-defense because he believed that an  
16 occupant of the other vehicle was reaching for something with which to attack him.” [Doc.  
17 No. 12-12.] Petitioner faults trial counsel for not presenting testimony from a ballistics  
18 expert whom petitioner claims would have explained, based on bullet trajectories and  
19 fragments, that petitioner could not have fired some of the shots. [Doc. No. 12.] Petitioner  
20 also faults his appellate counsel for not presenting trial counsel’s incompetence as a ground  
21 for reversal on appeal. *Id.* He further contends that the evidence at trial was insufficient to  
22 prove that he had the mental state required for the crimes of which he was convicted  
23 because he simply fired “warning shots” at the vehicle and did not intend to kill any of its  
24 occupants. *Id.*

25 Respondent contends that any favorable expert would have been rejected by the jury  
26 in light of petitioner’s own testimony admitting that neither he nor his friends were in  
27 imminent danger at the time he shot at the car in which the victim was riding, and admitting  
28 that he fired before he could determine whether a passenger in the other car was actually

1 reaching for something. [Doc. No. 11-1, at p. 13.] Testimony from a ballistics expert would  
2 not have changed the fact that petitioner's claim that he acted in self-defense was  
3 contradicted by his own testimony. *Id.* This Court concurs.

4 Petitioner's claim that he acted in self-defense was contradicted by his own  
5 testimony. No testimony from a ballistics expert would have changed this. Petitioner's  
6 claims to the contrary are, at best, speculative and conclusory. Accordingly, petitioner has  
7 failed to show that the actual innocence exception applies to his failure to timely file a  
8 federal habeas petition.

#### 9 **B. Merits of the Petition**

10 As this Court has determined that no tolling – statutory or equitable – can save this  
11 Petition from a finding that it is time-barred under AEDPA's one year statute of limitations,  
12 it will refrain from addressing the merits of the claims presented in petitioner's Amended  
13 Petition. [Doc. No. 5.]

#### 14 **IV. CONCLUSION**

15 Petitioner filed his First Federal Petition on July 11, 2016 [Doc. No. 1] and his  
16 Amended Petition on August 10, 2016 [Doc. No. 5]. However, the AEDPA statute of  
17 limitations, including all applicable statutory tolling, ended on September 9, 2015. Further,  
18 petitioner has failed to carry his burden of establishing that he qualifies for equitable  
19 tolling. Accordingly, this Court **RECOMMENDS** that respondent's Motion to Dismiss  
20 [Doc. No. 11], be **GRANTED** and that the Amended Petition [Doc. No. 5] be  
21 **DISMISSED** as time-barred by AEDPA.

22 With respect to the recommendations made herein, this Report and Recommendation  
23 of the undersigned Magistrate Judge is submitted to the United States District Judge  
24 assigned to this case pursuant to 28 U.S.C. § 636(b)(1).


25 **IT IS ORDERED** that no later than **30 days from issuance of this Order**, any party  
26 to this action may file written objections with the Court and serve a copy on all parties.  
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1 The document should be captioned "Objections to Report and Recommendation Re:  
2 Defendants' Motion to Dismiss."

3 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with  
4 the Court and served on all parties no later than ten days after being served with the  
5 objections. The parties are advised that failure to file objections within the specified may  
6 waive the right to raise those objections on appeal of the Court's Order. *Martinez v. Ylst*,  
7 951 F.2d 1153 (9th Cir. 1991).

8 **IT IS SO ORDERED.**

9  
10 Dated: April 17, 2017

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13 Hon. Karen S. Crawford  
14 United States Magistrate Judge  
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